No. 43987-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON FITZGERALD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 12-1-00443-2

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in denying Fitzgerald's CrR 7.8 motion for relief from judgment based upon newly discovered evidence.

B. STATEMENT OF THE CASE.

The State accepts Fitzgerald's statement of the substantive and procedural facts.

C. ARGUMENT.

Fitzgerald appeals the denial of his motion for relief from judgment pursuant to CrR 7.8(b)(2). He provided to the trial court, in addition to his own declaration (CP60-61), the declarations of a co-defendant, Ty Martin (CP63-64), and two witnesses, Angel Yarbrough (CP66-67) and John Balcom (CP 69-70). He offered these declarations as newly discovered evidence which he claimed exonerated him by providing an alibi.

1. Standard of review.

A ruling on a motion pursuant to CrR 7.8 is reviewed for abuse of discretion. State v. Gassman, 160 Wn. App. 600, 608, 248 P.3d 155 (2011). An abuse of discretion occurs when the court bases its decision on untenable or unreasonable grounds. Id. The

party seeking a new trial on the basis of newly discovered evidence must meet each of five requirements.

> A trial court will not grant a new trial on the basis of newly discovered evidence unless the moving party demonstrates that the evidence "(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching."

Gassman, 160 Wn. App. at 609 (quoting State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981). Defendants seeking a new trial are differently situated than defendants facing trial, and the burden to meet these five factors is a heavy one. Gassman, 160 Wn. App. at 609. As to the first factor, Fitzgerald must show that the newly presented evidence would probably, not possibly, change the outcome of the trial. Id. When evaluating the proffered new evidence, the trial court considers its "credibility, significance, and cogency." State v. Larson, 160 Wn. App. 577, 587, 249 P.3d 669 (2011). The court must do so in order to decide whether the evidence will probably result in a different outcome if there is a retrial. State v. Barry, 25 Wn. App. 751, 758, 611 P.2d 1262 (1980).

> 2. Fitzgerald did not demonstrate that he used due diligence to obtain the testimony he now claims as newly discovered evidence.

Fitzgerald claims that he could not have obtained the testimony of Martin, Yarbrough, and Balcom before trial, no matter how diligently he sought it. He does not offer any evidence that he did, in fact, make an effort to obtain their testimony.

a. Ty Martin.

Fitzgerald is correct that the orders setting his conditions of release prohibited him from contacting his co-defendants. CP 87-88. He implies in his argument that therefore there was nothing he could do. However, his attorney did make an effort to interview one co-defendant, Michael Cairns,[1] before trial. The reason for Fitzgerald's motion to continue the trial date, which was heard on September 3, 2012, was to allow defense counsel to speak to Cairns, who counsel understood had recently pled guilty to the original charges. 09/13/12 RP 3. "I believe at this point that Mr. Karens (sic) would shed some light on Mr. Fitzgerald's part in this offense that would be helpful to Mr. Fitzgerald's case, and I just don't have time to bring him down from DOC at this point." 09/13/12 RP 4. The same no-contact order was in place for Cairns as for Martin, and the court, which denied the motion for

1 Michael Cairns name is misspelled as "Karens" in the transcript of the hearing of September 13, 2012.

continuance, did not even infer that it was improper for counsel to seek to interview Cairns. 09/13/12 RP 5.

Even if Fitzgerald did feel that the no-contact order prohibited him from seeking Martin's testimony, he apparently did nothing to seek modification of the order to permit a third party, such as his attorney, to speak to Martin. He simply did nothing.

Fitzgerald relies largely on State v. Slanaker, 58 Wn. App. 161, 791 P.2d 575 (1990), to support his argument that he used due diligence. He argues that even though he could predict the substance of the witnesses' testimony, it wasn't "known" until the witnesses were contacted and thus is newly discovered evidence. Supplemental Brief at 8. The State does not dispute that under some circumstances a missing witness's testimony may be newly discovered evidence even where the defendant knows what the witness would likely testify about, "'where reasonably diligent efforts to produce the witness have been unavailing'". Slanaker, 58 Wn. App. at 176 (quoting State v. Caldwell, 112 Idaho 748, 751, 735 P.2d 1059, 1062 (1987)). The facts in Slanaker, however, were much different from the facts in Fitzgerald's case. Fitzgerald did not make reasonably diligent efforts.

Slanaker was convicted of multiple counts of first degree robbery and first degree assault. He maintained that at the time the crimes were committed he was with two women, neither of whom he could locate until at least a year following his convictions. Slanaker, 58 Wn. App. at 162-63. He testified at his trial about the women. Id at 162. He later obtained affidavits from them explaining why Slanaker could not find them before trial. Id. at 163. The trial court granted his motion for a new trial, and entered findings of fact and conclusions of law that Slanaker had used due diligence in attempting to locate the witnesses prior to trial. Id. at 165. The opinion does not detail what those specific findings were, but the court noted, "Here, the limited record indicates that there was no likelihood [the witnesses] probably would have been found before trial." Id. at 165.

In Fitzgerald's case, he did not testify at trial. Trial RP 273. The record is devoid of any mention of an alibi until he filed his CrR 7.8 motion seeking a new trial. The record is similarly devoid of any information about efforts to modify the no-contact order so he could speak to Martin about his testimony. Significantly, he does not even mention Cairns, who was also a co-defendant, was with Martin at the time of the crime, and could presumably also testify

that Fitzgerald was not part of the burglary. Fitzgerald offers no excuse for making no effort whatsoever to modify the order, and it is plain from the hearing on September 13, 2012, that the court was not attempting to prohibit defense counsel from contacting Cairns. It is simply incredible that had Fitzgerald told his attorney about his alibi, counsel would not have made every effort to obtain the testimony of both co-defendants. The obvious inference is that Fitzgerald did not mention an alibi defense until long after the trial.

While Slanaker generally stands for the proposition that evidence can be "newly discovered" when the existence of the witnesses is known, but the substance of their testimony is not, it does not dispense with the additional element that to be newly discovered it must be the case that the evidence could not have been discovered before trial with the exercise of due diligence. In Slanaker, the court made that finding. Here, the court did not, nor does the record indicate that such is the case. Fitzgerald simply made no effort to obtain Martin's testimony until he fortuitously encountered him at Stafford Creek. CP 41. The trial court was correct that he did not meet the heavy burden of defendants seeking postconviction relief. Gassman, 160 Wn. App. at 609.

b. Angel Yarbrough and John Balcom.

Fitzgerald claims he could not have contacted Angel Yarbrough because she moved and changed her name, and he did not know Balcom's last name and so couldn't locate him prior to trial. He obtained their declarations only after his conviction when Yarbrough fortuitously heard about his conviction and contacted his family. CP 42. Fitzgerald does not identify any steps he took to locate either of these people before trial.

As discussed above, the court in Slanaker found that Slanaker had made efforts to locate the missing witnesses and that further reasonable efforts would have not been successful. Slanaker, 58 Wn. App. at 165. In Fitzgerald's case, he offers that Yarbrough changed her name and moved. CP 42. But Yarbrough does not assert in her declaration that she left the area, and the declaration was signed in Lacey, Washington. CP 66-67. It does not seem reasonable that inquiries at her old address or from mutual acquaintances would have been fruitless. Had he made such inquiries, he would at least have made a showing of some effort. It is not apparent from his motion or the declarations that he was aware that Yarbrough had moved until she contacted his family. Fitzgerald makes no claim that he did not know any other

people who knew either Yarbrough or Balcom. He simply failed to demonstrate any effort he made to locate the witnesses he now presents as newly discovered evidence.

While the trial court in this instance did not make formal findings of fact or conclusions of law, its oral ruling shows that it found Fitzgerald had not exercised due diligence.

> In this particular case, the alleged new evidence is simply testimony, and I understand that there may be many different views on whether that testimony could have easily been obtained prior to trial, but I note that Mr. Fitzgerald did have an attorney representing him at trial. He had information about these witnesses. Again, not sure how specific that information is, but there are a lot of things that the Court doesn't know about possible tactical decisions or other reasons why these things were not pursued before.
>
> But this Court finds that, based upon the facts that I do know, Mr. Fitzgerald fails to meet his burden to show each of the elements that this newly discovered evidence actually meets the legal burden to justify a new trial and the vacation of his judgment and sentence. Therefore, the Court is denying the motion.

04/25/13 RP 11-12.

The court did not abuse its discretion.

> 3. The testimony of Yarbrough is not material and the testimony of Balcom only marginally so. Martin's testimony is of dubious credibility. It is not probable that the testimony would change the result of the trial.

Fitzgerald claims that the evidence presented by Yarbrough and Balcom would establish his alibi and thus the jury would probably acquit him in a new trial. The declarations of those two witnesses don't actually prove anything.

The substance of the declarations of both Yarbrough and Balcom is that they gave Fitzgerald a ride to the vicinity of the off-ramp to Summit Lake Grocery, where he claims to have met up with Martin and Cairns. RP 66, 69. How Fitzgerald got to the area is totally irrelevant. The only information of any relevance is in Balcom's declaration stating that the last time he saw him, Fitzgerald was walking down to Summit Lake Grocery "about 9:00 a.m." CP 69. Sgt. James Dunn testified that the dispatch center received the call from the victim of the burglary at 9:14 a.m. Trial RP 35. Fitzgerald offers no evidence of the distance between Summit Lake Grocery and the victim residence, or indeed, the distance between the place Balcom says Fitzgerald got out of his vehicle and Summit Lake Grocery. Even if those declarations are true, it is not apparent that if Fitzgerald started walking toward the grocery store "about 9:00 a.m." that he had insufficient time to meet up with Martin and Cairns and be present at the scene of the

burglary at 9:14 a.m. "About 9:00 a.m." can cover a significant time period.

Neither Balcom nor Yarbrough makes any claim that they knew what Fitzgerald was doing after he left them. How he got to the area is irrelevant to either proving the crime or establishing an alibi. Fitzgerald argues that a jury hearing these three witnesses would have to conclude that all three of them were lying in order to convict him, Supplemental Brief at 11, but a jury could well believe both Yarbrough and Balcom, while disbelieving Martin, and still find him guilty.

A jury might well disbelieve Martin's testimony. There is no suggestion in the record that Martin, who apparently pled guilty to the burglary, made any effort to exculpate Fitzgerald until they met at Stafford Creek. A jury might also consider that Martin, who was identified by the victim as one of the burglars, Trial RP 129, and having been found guilty, would have felt he had little to lose by offering perjured testimony to help his friend, who had not been identified at the scene.[2]

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2 The victim did not see Fitzgerald at the scene, but there was no testimony to the effect that Fitzgerald could not have been there, out of sight of the victim. Trial RP 114-16, 129; 04/25/13 RP 10.

"When considering whether newly discovered evidence will probably change the trial's outcome, the trial court considers the credibility, significance, and cogency of the proffered evidence." State v. Larson, 160 Wn. App. 577, 587, 249 P.3d 669 (2011). The court here had good reason to find that the newly discovered evidence lacked credibility, materiality, and cogency.

4. Fitzgerald makes incredible claims, unsupported by the record, about his attorney's performance.

As discussed above, trial counsel sought a continuance of the trial date for the purpose of bringing Michael Cairns to Thurston County from the Washington Corrections Center to interview him as a potential witness for Fitzgerald. 09/13/12 RP. In his CrR 7.8 motion, Fitzgerald claims that counsel refused to obtain Martin's testimony. CP 41-42, 04/25/13 RP 7. He argued at the hearing on his motion that he had told his attorney about Yarbrough and Balcom but counsel not only refused to contact them, but withdrew "from the record" when asked to do so. 04/25/13 RP 10.

First, there is nothing in the record to indicate counsel withdrew. The same counsel who represented him before trial, and made the motion to continue, 09/13/12 RP, represented Fitzgerald at trial. Trial RP.

Second, such conduct on the part of the attorney makes no sense. No attorney, aware that his client has an alibi for the crime for which he is charged, will refuse to seek witnesses or "withdraw" when asked to do so. The logical inference from the record is that Fitzgerald did not tell his attorney he had an alibi defense.

Fitzgerald did not take the stand at trial, quite likely because he did not want to face impeachment with his lengthy criminal history. CP 45. Still, he had little to lose by testifying. A defense that is not presented is no better than a defense that is not believed. Also, any reasonable defense attorney faced with a client who was better kept from testifying, and aware of an alibi defense, would have made a major effort to locate the alibi witnesses. Here the trial court could justifiably presume, particularly in light of Fitzgerald's criminal history, that counsel had likely contacted Martin and Cairns and concluded their testimony would not be helpful and that there was no alibi defense. If that were the case, there would be no reason to seek alibi witnesses; in fact, as argued above, Yarbrough and Balcom do not provide an alibi. Only Martin's suspect declaration supports Fitzgerald's CrR 7.8 motion.

"In evaluating the probative force of newly presented evidence the court may consider how the timing of the submission

and the likely credibility of the affiants bear on the probable reliability of that evidence." Gassman, 160 Wn. App. at 109 (quoting State v. Riofta, 166 Wn.2d 358, 372, 209 P.3d 467 (2009), internal quotation marks omitted). The record does not reflect any reason to believe Fitzgerald's assertions about his counsel are true. The trial court could, considering the timing of these claims and their likely credibility, reasonably deny the motion for relief from judgment.

> 5. The State agrees that the evidence is not cumulative, but none of the other factors bearing on a motion for a new trial have been satisfied. All of them must be met to justify the grant of a new trial.

The State does not dispute that the declarations of Yarbrough, Balcom, and Martin are not cumulative. Fitzgerald had never made any offer of an alibi defense. But the absence of any one factor is sufficient to justify denial of a motion for a new trial. Gassman, 160 Wn. App. at 609. None of the other four elements has been satisfied.

D. CONCLUSION.

While the trial court did not make a detailed ruling when denying Fitzgerald's motion, it is complete enough for this court to find that the basis of the denial was lack of diligence in seeking the

evidence he now claims as newly discovered. The record supports that conclusion. The trial court did not abuse its discretion. The State respectfully asks this court to affirm Fitzgerald's convictions.

Respectfully submitted this 27th day of January, 2014.

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THURSTON COUNTY PROSECUTOR

January 27, 2014 - 1:48 PM

Transmittal Letter

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